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DISTINCTION AS TO AGENCY OF NURSES IN CHARITABLE INSTITUTIONS AND IN HOSPITALS FOR PRIVATE GAIN.

In 78 Cent. L. J. 326, we discussed the case of Schloendorf v. The Society of New York, 105 N. E. 92, which held that a nurse in caring for a pay patient in a charitable institution is not a servant of the institution nor is it responsible for her acts.

It was said: "The superintendent is a servant of the hospital; the assistant superintendent, the orderlies and the other members of the administration staff are servants of the hospital. But nurses are employed to carry out the orders of the physicians, to whose authority they are subject. The hospital undertakes to procure for the patient the services of a nurse. It does not undertake, through the agency of nurses, to render those services itself. The reported cases make no distinction in that respect between the position of a nurse and that of a physician."

In Nebraska we find two decisions, rendered by a bare majority of the Supreme Court, which reject this theory, so far, at least, as a hospital conducted for private gain is concerned. Broz v. Omaha Maternity &c., Assn., 148 N. W. 575; Wetzel v. Same, id. 582.

In the latter case the principle is stated as follows: "A patient is generally admitted to a hospital for private gain, under an implied obligation, that he shall receive such reasonable care and attention for his safety, as his mental and physical condition, if known, may require. Any other rule would be a reproach to the law and to hospital management. In the present case the evidence is sufficient to justify a finding that decedent was received under circumstances entitling him to the benefit of the principle stated."

The way the decedent was received in defendant hospital was upon a charge of $10 per week for general care, as distinguished from special care at the rate of $25 per week, there being a physician selected for him by his friends. Nurses were to obey all of this physician's directions.

It appears decedent was delirious from typhoid fever, and though at first strapped to the bed upon the nurse's initiative the straps were removed so that frequent changes in the positions of his body, necessary in his illness, could be made. During a very brief absence of the nurse, one day, the decedent got out of bed and jumped out of a window and was killed.

There was a long array of authorities cited to the general proposition that a hospital for private gain is liable in damages for the negligence of its nurses and other employes. There is an assumption here that a nurse is like any other employe, but even though she be paid by the hospital as part of its force, the opinion does not discuss the question of her being or not like, as said by the New York court, an administrative employe.

While we may conceive that a hospital whether a charitable institution or a hospital organized for private gain, might be bound to a patient for recommending to doctors having patients there incompetent or inexperienced nurses, we fail to understand how a nurse that is competent would have to obey the directions of a doctor of a patient, and yet the hospital be responsible for her conduct.

While a state may not license a nurse yet if it did before she could practice her profession as such, it would seem clear the hospital would not be responsible for her acts. But without such license being required she nevertheless appears but as an assistant to the physician in ministering to a patient and the hospital is not supposed to supervise her or control her acts. A physician's independence in action could not be preserved and he permit the nurse to be under the direction of another. And

a hospital presumptively would be negligent in directing her as to her duties at all.

The nurse then going her way so far as the hospital is concerned, would seem to be either the physician's agent or acting upon her own initiative, when outside of the scope of her duties. The hospital cannot interfere, because it cannot know, in an official way, when the nurse or whether she is not following a physician's directions.

How then may one be held liable on the doctrine of *respondeat superior* when he is totally unable to define the limitations of a servant's duty? But there is a principle of responsibility, to which we have alluded, in the hospital keeping on hand nurses, which a physician may presume to be competent, when in truth and in fact they may not be. This, however, tends in no way to detract from the rule that a nurse is under duty to obey the directions of a physician in charge of a patient.

The facts in these two cases reveal nothing whatever, if negligence at all (an able dissent in each case disputing that there was any) but such a temporary absence as might occur, where special care was not provided for, in almost any case. But, at all events, the nurse presumptively was representing him whose directions she had to obey, namely the physician in the case.

NOTES OF IMPORTANT DECISIONS

ATTORNEY AND CLIENT—REPEAL BY IMPLICATION OF THE RULE AGAINST CHAMPERTY AND MAINTENANCE.—In Michigan there was an early statute, how early it does not appear from the opinion in the case of Lehman v. Detroit G. H. & M. R. Co., 147 N. W. 628, decided by Michigan Supreme Court. It provided specifically against any attorney, etc., lending or advancing any money in any form to induce the placing in his hands of anything in any action for collection.

Another early statute allowed a party to make any arrangement he saw fit for the compensation of an attorney, etc., the latter statute presumptively being passed subsequently to the former. Still another statute was in regard to the conveyance of lands in the adverse possession of another, abolishing the common law rule on this subject.

In the above case it was decided, all of these being old statutes, that the rule against champerty and maintenance was absolutely abolished in Michigan and an attorney could agree to advance costs and maintain a suit in consideration of a share of the recovery in an action for damages.

This seems to us a singular ruling. The last named statute was only for a special purpose regarding the conveyance of land and instead of abolishing the general rule on the subject seems in the principle *expressio unius* distinctly to recognize it.

The other statute refers alone to the right of a party to arrange for an attorney's "*compensation*" for services and, therefore, to provide in no way for a speculative gambling in money, laid out in maintaining litigation, which idea becomes all the more prominent when this gambling idea involves the repeal by implication of an express denouncement of a prior statute. There is another thought just here also. If the statute regarding compensation to an attorney gives him the right to advance money to maintain a suit, then he alone, and nobody else, may do this. But why should he alone be given such a privilege? And if he alone may do it, there is special legislation in favor of a class, and the entire law as to maintenance and champerty is not repealed by statutory enactment.

It seems to us that all laws in aid of contingent fees in recoveries, while wholesome, yet go upon the theory that an attorney shall not agree to maintain a suit, for the reason that decision consistently proceeds upon the absolute right of the client having full control of a case as to its being persisted in, dismissed or settled, any agreement with the attorney to the contrary notwithstanding. Statutes giving a lien after notice to the opposing party as to any settlement effected, is as far as they have pretended to go. And public policy enjoins that this is as far as they should go. But, if an attorney has a contract right to maintain a suit, he ought to have the right to prevent his client from settling or dismissing same.

MONOPOLY — AGREEMENTS CONTROLLING SERVICES OF BASEBALL PLAYERS.—While it is decided, that equity has jurisdiction to enjoin a baseball player whose ability is of a unique, unusual and extraordinary character from violating an implied or express contract not to work for another, yet the New York Supreme Court, special term, holds that where

the agreement is in behalf of a combination controlling practically all of the skillful players of the country, claiming the right to barter away such services and to blacklist all players, who do not submit to its control, it will not be enforced in equity. American League B. B. Clubs v. Chase, 149 N. Y. Supp. 6.

The court considering provisions of the "national agreement" in baseball, says: "'Organized baseball' is now as complete a monoply of the baseball business for profit as any monopoly can be made. It is in contravention of the common law, in that it invades the right to labor as a property right, in that it invades the right to contract as a property right, and in that it is a combination to restrain and control the exercise of a profession or calling."

The court denies, however, that the federal anti-trust act applies to such an agreement, because "baseball is an amusement, a sport, a game that comes clearly within the civil or criminal law of the states, and it is not a commodity or an article of merchandise subject to the regulation of Congress on the theory that it is interstate commerce."

It may be true that services to be rendered by a baseball player are not goods in interstate commerce, but it seems not proper to speak of them as being acts in "an amusement, a sport, a game," for the agreement in this case took them out of the realm of such and made them services in a business for profit, as all the rest of this opinion shows.

Thus it was said: "If a baseball player like the defendant, who has made baseball playing his profession and means of earning a livelihood, desires to be employed at the work for which he is qualified and is entitled to earn his best compensation, he must submit to dominion over his personal freedom and the control of his services by sale, transfer, or exchange without his consent, or abandon his vocation and seek employment in some other kind of labor." This submission, compulsory in nature, is condemned, because baseball is not "an amusement, a sport, a game," but a profession, avocation or pursuit in which services are rendered.

The court further says: "There is no difference in principle between the system of servitude built up by the operation of this national agreement, which provides for the purchase, sale, barter and exchange of the services of baseball players—skilled laborers—without their consent and the system of peonage brought into the United States from Mexico and thereafter existing for a time within the territory of New Mexico."

It further speaks of this placing players "under the dominion of a benevolent despotism through the operation of the monopoly established by the national agreement."

All of this seems proper, but it is inconsistent for the court in one breath to be calling baseball a sport and in the next breath playing therein services. And remarks about peonage are not accurate judicial reasoning. The whole question is whether there was undue limitation upon one's right to contract for employment. Perhaps this contract is not greatly unlike agreements by a labor union. If it is in pursuance to protection of the legitimate purposes of laborers in a baseball union, there seems some cases which seem strongly to support its legality, one of which was considered in 79 Cent. L. J. 199.

RIGHT TO SET OFF CLAIMS AGAINST THE ESTATE IN AN ACTION BROUGHT BY A RECEIVER.

Probably no single, narrow legal question upon which the decisions have been so nearly unanimous has been as productive of litigation as the question, has one who is sued by a receiver the right to use as a set-off in that action a debt owing to him from the corporation or individual in the hands of the receiver?

The answer to this question has been practically unanimous and in the affirmative. It has been repeatedly contended as against this right of set-off that to authorize such a set-off would be to give the creditor who happened to also be a debtor a preference over other creditors, that this was unfair and unjust to the other creditors and that all persons owing the party in the hands of a receiver ought to pay in full in order that there should be no preference between creditors and then take their proportion of the assets with the other creditors. Generally speaking, in fact it may almost be said universally the courts have answered this question by saying that the receiver had no claim and the assets of the corporation did not include any claim for more than the difference between the two

debts, that is to say the debtor of the estate who was also its creditor owed the estate no more than the difference between the two obligations and consequently this remainder is all that passed to the receiver by virtue of his appointment; this being true he is not the assignee of any more than that amount and is not in a position to undertake to recover any more.

Typical of this rule of decision is the case of Colton v. Drovers' Building Association[1] which was an action by the receiver of an insolvent bank seeking to recover upon a promissory note of the Drovers' Building Association. At the time of the appointment of the receiver this note for $1,000 was not yet due, but the association had on deposit with the bank the sum of $357.25. When the note became due the association tendered to the receiver the sum of $642.75, but the receiver refused to accept the amount, although subsequently he did receive it under an agreement that he should not prejudice his right to recover the balance of the note, and the action was for that balance. It was contended on behalf of the receiver that the set-off ought not to be allowed because that would be in effect giving the Building Association a preference over the other creditors of the bank, and that it was the duty of the receiver to distribute the assets pro rata. In answer to this contention the court says: "If the appellee (The Drovers' Building Association) was merely a creditor that argument might prevail, but that was not the relation that existed between the two. The appellee was not only a creditor to the amount of its deposit, but was a debtor to the amount of the note held by the bank, its debit was larger than its credit, and if the bank had not failed it could only have recovered the difference between the two. Do the receivers occupy any better position? The general rule undoubtedly is that the receiver takes subject to set-offs which the defendant might have set up against the original owner."

To the same effect and upon the same grounds is Steelman v. Atchley[2] where it is said in the same kind of a case that receivers are not regarded as purchasers for value, but take the assets subject to set-offs, liens and incumbrances as they existed at the time of their appointment. "The receiver of the insolvent bank was only entitled to collect the amount of the note to it after deducting the amount due by the bank to the maker on his general deposit at the time of the receiver's appointment, and since the amount due appellant from the bank exceeded the amount which was due from him to the bank at that time by 31 cents he was entitled to a decree allowing his set-off in the sum claimed and for the said sum of 31 cents against the receiver."

The receiver only succeeds to the rights of the corporation and any set-off which could have been enforced against the corporation is valid and enforcible against the receiver.[3]

This is also the rule under the civil law and prevails in the states which follow the civil law where it is said that the syndic of an insolvent private bank may not recover the whole amount of a customer's note leaving the customer to come in and receive his dividend upon his deposit with the other creditors, but that the note will be held to have been compensated and extinguished by the amount of the deposit.[4]

It was said in New Jersey that such a claim did not constitute a legal set-off under the set-off statute as against a receiver, but

(1) 90 Md. 85, 45 A. 23, 46 L. R. A. 388, 78 Am. St. Rep. 431.

(2) 98 Ark. 294, 135 S. W. 902.

(3) Osborne v. Byrne, 43 Conn. 155; Sheafe v. Hastie, 16 Wash. 563; 48 P. 246; Fort v. McCully, 59 Barb. 87; Jordan v. Sharlock, 84 Pa. St. 366, 24 Am. Rep. 198; In re Van Allen, 37 Barb. 225; McCagg v. Woodman, 28 Ill. 84; Miller v. Franklin Bank, 1 Paige (N. Y.) 444; Hade v. McVay, 31 Ohio St. 231; Assignment of Hamilton, 26 Ore. 579, 38 Pac. 1088; Clarke v. Hawkins, 5 R. I. 219; Davis v. Industrial Mfg. Co., 114 N. C. 321, 19 S. E. 371, 23 L. R. A. 322.

(4) Beatty v. Scudday, 10 La. An. 404.

this is upon purely statutory grounds in a court of law where equitable considerations did not prevail.[5]

Although this right to a set-off is recognized interest will not be allowed upon the deposit in bank which is in the nature of a general commercial deposit.[6]

This rule prevails even as against the receiver of a bank which is also a state depository and depositors who are indebted on notes to the bank are entitled to the same right of set-off even though the state deposits are thereby in part lost for the lien of the state affects only the balances due after such set-off.[7]

This right of set-off, however, is only allowed to claimants whose obligation is on the same level or of the same class as their claim, that is to say it is allowed between the claimant who is also a debtor when his claim is on a simple contract and when his debt is due upon a simple contract. If his debt is due upon a specialty, or if his debt is due upon a judgment, the right of set-off is not allowed. Thus where the depositor is the mortgagor of a bank and the receiver seeks to foreclose the mortgage the depositor may not set-of his deposit in such foreclosure proceedings because his equity is not superior to that of the other depositors to have the mortgage collected and applied upon all deposits.[8]

Likewise where the depositor is a judgment debtor of the bank he may not set-off his deposit against the judgment.[9]

As will appear upon an examination of the case already referred to the right of set-off is allowed upon the theory that whatever claims come into the hands of the receiver come diminished by any demands owing to such debtors from the estate in the hands of the receiver that the receiver is the creature of a court of equity and that equity always authorizes a set-off to avoid multiplicity of suits, and when the equities of the situation demand it to protect the rights of the parties.

Before proceeding to a further consideration of the question at issue, a decision of the New York Supreme Court of more than fifty years ago ought to be carefully read, for very many phases of the problem presented were there passed upon. In that case a depositor in a bank in Albany whose deposit at the time of the appointment of the receiver exceeded the amount of a note which he then owed the bank petitioned the court to direct the receiver to apply the note at maturity, upon the amount due the depositor. The receiver filed a cross petition praying for advice and instruction of the court generally upon the matter of the allowance of set-off. The court passed upon both petitions at once saying:

"The most important subject on which the aid of the court is invoked is in regard to cases of mutual claims between the bank and parties dealing with it. These are of various characters. (1) Where at the time of the appointment of the receiver, debts exist owing to, and owing by, the bank, and both due. (2) Where such debts exist, but on the one side or the other, the debt has not become due, and more commonly, if not universally, the debt from the dealer or customer, to the bank has not matured. (3) Where the demand is unliquidated. (4) Where the debt due to the bank is from a firm or from several persons jointly, and the debt due from the bank is owing to only one or more of such persons, but not to all.

"In case of debts actually due both from the bank to a customer or other party, and from such customer or other party to the bank, I do not see any reason why in equity, at the instance of either, and especially at the instance of the solvent party,

(5) Van Wagoner v. Paterson Gas Light Co., 23 N. J. L. 283.

(6) Sickles v. Herold, 15 Misc. Rep. 116, 36 N. Y. Supp. 488; People v. St. Nicholas Bank, 76 Hun. 522, 28 N. Y. Supp. 114.

(7) State v. Brobston, 94 Ga. 95, 21 S. E. 146, 47 Am. St. Rep. 138.

(8) Hannon v. Williams, 34 N. J. Eq. 255, 38 Am. Rep. 378.

(9) Spellman v. Payne, 84 Va. 435, 43 S. E. 749.

who is most interested in making the application, the one claim should not be applied upon the other to extinguish the same, either wholly or as far as it will go. The real debt is only the difference between the two; and if a suit were brought, the application would be a matter of course, within the doctrine of set-off. Nor do I see that either (the demand being over due) could assign the claim held by him or it, so as to vest a superior title in the assignee. It would still be subject to the equities between the original parties. Such an application of the one demand upon the other is moreover, I think, directly within the provisions of law in regard to insolvent corporations.

"The case of debts not yet due, or where on the one side or the other—and especially in regard to the debt due from the dealer or customer to the bank—the debt is not due, is not identical in principle. In the case of negotiable paper thus situated, held by the bank, it is plain that the bank, before its failure, could successfully transfer it to a third person for value, if done bona fide: and I do not see why it could not legally be done by its assignee or receiver. It might not be considered a discreet or commendable exercise of the powers of a receiver, and yet it seems to me a legal and effective title would pass to a bona fide purchaser. Nevertheless, demands of this character seem also to be embraced within the description of mutual debts and mutual credits, before enumerated. And where the creditor of the bank, whose debt to the bank is not due, notifies the receiver of his wish to apply the same in partial or total satisfaction, as the case may be, of his claim arising from his deposit in the bank, and insists upon the same, I think the receiver should yield to it and make the application. In such an event, upon the receiver's refusal, I think the creditor would be entitled to commence an action for the purpose of compelling such application, and could obtain a decree to that effect.

"If it should so happen (which is doubtful and must be of very frequent occurrence) that the debt owing by the bank was not yet due, and the debt owing to the bank was by a debtor who was himself insolvent, which would present a case where it might be to the interest of the receiver to make the application, and to the interest of the other party not to do so, I do not think the receiver could make the application, or insist upon it; for it is not the province of the party whose debt is not due to insist upon having the benefit of the payment before maturity, which would be equivalent to altering the contract of the parties, and in effect allowing a party to commence a suit for the recovery of his demand before it was due.

"Where the debt is unliquidated and incapable of liquidation without the aid of a jury or of extrinsic evidence, the right of set-off is not absolute, but in equity must depend upon the circumstances of the case. It does not come within the statute of set-off. At the same time the receiver would not be justified in interposing any unconscientious obstacles to the liquidation of the demand, or with unreasonable haste to press the collection of the claim due to the bank, with a view of excluding the set-off. He must act in good faith, and adopt all proper and prudent measures to put the creditor's claim in the way of liquidation before the period of distribution. This is conscientious and just.

"Where the debts are not due to and from the same persons in the same capacity, the right of set-off does not exist. Therefore, where on the one side, the debt due to the bank is due from a firm or from several persons jointly, and the credit belongs to an individual, or vice versa, equity does not require or justify an application of the rule of set-off. It cannot be said, in any just sense, that these are mutual debts or credits, nor would I think, an assignment of the demand by the creditor of the bank, after the appointment of the receiver, so as to

vest the title to such demand in the same person or persons who are indebted to the bank, and having that object directly in view in order to accomplish a set-off, have that effect. The rights of the receiver becomes fixed at the time of his appointment; the rights of creditors of the bank represented by him then attach; and it would not be equitable to countenance any subsequent arrangement to give any one of them an undue preference over the others. Parties must stand or fall by the condition of things in existence at the time of the appointment of the receiver, unless special equities exist. This principle does not, however, prevent the application of the doctrine of set-off, where the credit equitably and in reality belongs to the same persons from whom the debt is owing, or where it is established, or is obvious, from the dealings of the parties, that their contract or intention was to apply the one in extinguishment of the other. In short, special circumstances may, in this as in other cases, exist to take the case out of the operation of the general rule."

Maturity of the Obligations.—Generally speaking, the obligations must both have been due at the time of the receivership, or there is no right of set-off.[11] A unique example of the application of this rule is Newcomb v. Almy[12] where an insurance company went into the hands of a receiver holding claims against the holder of two endowment policies, which were not due, however, at the time of the receivership. These policies provided for the payment of the sums named therein after the expiration of a certain period to the assured if living; if the assured should die before that time the amount was to be paid to the wife of the assured. The policies had a reserve or surrender value at the time of the receivership, but the court denied the right to use this as an offset. What may be thouht at first blush to be an exception to this rule is the right of a depositor to set-off his deposit against a note not yet due when the receiver was appointed. That he has this right will be undisputed after an examination of the cases referred to.[13]

The principle is that the deposit, although due only on demand, becomes due immediately upon the insolvency of the bank, and the appointment of the receiver so that if the note be then due as the obligation of the depositor has then matured the right of set-off instantly attaches. If the note has not then matured it being to the depositor's advantage that it should then mature he may mature it and the law will assume or imply that he has since, he may discharge the obligation at any time. This seems, of course, like a stretching of logic in order to save the rule, but this is the reasoning of the courts and upon this reasoning the rule is not infringed for the courts in allowing the set-off of a bank deposit against the depositor's note to the bank have proceeded upon the theory that the note and the deposit were both due in all cases upon the appointment of the receiver.

Mutuality of the Obligations—Rights in Which They Accrue.—In order that a set-off may be allowed, the obligations must accrue in the same right or title. If the indebtedness to the estate is individual, it is essential that the obligation of the estate to the debtor shall be to him in his indivi-

(10) Wheeling Bridge Terminal Ry. Co. v. Cochran, 68 Fed. 141, 15 C. C. A. 321, 25 U. S. App. 306, In re Van Allen, 37 Barb 225.

(11) Assignment of Hamilton, 26 Ore. 579, 38 Pac. 1088; Lees v. Hayden, 78 Hun. 370, 29 N. Y. Supp. 179; United States Trust Co. v. Harris, 15 N. Y. Super. Ct. 75; But see Berry v. Brett, 19 N. Y. Super. Ct. 627.

(12) 96 N. Y. 308; See also Muhart's Exc. Bank v. Fuldner, 92 Wis. 415, 66 N. W. 691.

(13) Yardley v. Clothier, 49 Fed. 337; Fisher v. Hanover Nat. Bank, 64 Fed. 832; 12 C. C. A. 430; Thompson v. Union Trust Co., 130 Mich. 508, 90 N. W. 294, 97 Am. St. Rep. 494; Balch v. Wilson, 25 Minn. 299, 33 Am. Rep. 467; Munger v. Albany Nat. Bank, 85 N. Y. 580; Clute v. Earner, 8 App. Div. 40, 40 N. Y. Supp. 392; Seymour v. Dunham, 24 Hun. 93; Davis v. Industrial Mfg. Co., Supra; Jack v. Klepser, 196 Pa. 187, 46 A. 479, 79 Am. S. Rep. 699; Jones v. Prening, 85 Wis. 264, 55 N. W. 413.

dual capacity, and this principle applies as well to the character of the receivership, so where a receiver has been appointed, upon the suit of domestic creditors, over a foreign corporation, as the receiver only represents the domestic creditors, a note of the corporation may not be used as a set-off against him.[14] As illustrative of the same principle where a bank is in the hands of a receiver, one who has borrowed money from it to purchase the interest of an estate in a firm and pays off the different persons interested in the estate with checks upon the funds so borrowed, if one of these parties leaves the amount on deposit at the bank, the borrower does not have a right of set-off.[15] And if a borrower has a check drawn in his favor at the time of the bank's insolvency, he may not use such check as a set-off.[16] And where the bank has discounted a draft, payment on which is subsequently stopped, the drawer may not use the draft as a set-off.[17] The fact, however, that a depositor has the word "assignee" appended to his name in the account does not prevent the use of his deposit as a set-off where it is his individual property.[18] The principle being that the claim against him and the claim in his favor accrue in the same right.

A claim owing to the receiver and resulting from contract relations with him must be paid in full and is not subject to diminution by way of set-off of a claim owing by the estate to the debtor of the receiver.[19] Where, however, the receiver is seeking to recover the price of goods delivered in part performance of a contract made by the corporation the vendee's right to damages for failure to deliver all of the goods contracted for may be made the basis of a set-off.[20] Illustrating the principle that the obligations as to the estate must accrue to and against the receiver in the same right or title. Likewise, sums owing by an estate to a partnership may not be made the basis of a set-off in favor of one of the partners[21] unless the fund on account of the predominance of the partner in the affairs of the firm in reality belongs to one partner and not to the firm.[22]

Where the estate is owing its debtor in some particular capacity as a public officer[23] there is no right of set-off against the indebtedness owing to him individually, and the same rule applies where the creditor of the estate is such by virtue of his official capacity in some private organization or society, and when he owes the estate in his individual capacity where, however, the obligation to the estate, although apparently individual, was in reality for money borrowed for the use of the society the set-off will be allowed.[24]

In New Jersey the court has taken the view that even though a set-off cannot be allowed under the statute enabling mutual dealers to discount that, nevertheless, a receiver having been appointed by a court of equity and having under the law equitable powers should set-off debts according to the justice of the case.[25] Another illustration of this principle and an application

(14) Hall v. Hollandhouse Co., 12 Misc. Rep. 55, 33 N. Y. Supp. 50.

(15) People v. German Bank, 116 App. Div. 687, 101 N. Y. S. 917.

(16) Butterworth v. Peck, 18 N. Y. Super. Ct. 341.

(17) Robinson v. Howes, 20 N. Y. 84.

(18) Laubach v. Leibert, 87 Pa. St. 55.

(19) Farmers Loan & Trust Co. v. Northern Pac. R. Co., 58 Fed. 257; Barber Asphalt Co. v. Forty-second Street, Etc., R. Co., 175 Fed. 154; Chicago, Etc., Iron Works v. McKey, 93 Ill. App. 244; Cook v. Cole, 55 Iowa 70, 7 N. W. 419; Bowling Green Savings Bank v. Todd, 64 Barb. 146; Osgood v. Ogden, 3 Abb. Dec. 425; Davis v. Stover, 58 N. Y. 473; Beeler v. President, Etc., 14 Pa. St. 162.

(20) Kuebler v. Haines, 229 Pa. 274, 78 A. 141.

(21) Fisher v. Knight, 61 Fed. 491; 9 C. C. A. 582; 17 U. S. App. 502; In Re Van Allen, Supra.

(22) Second National Bank v. Hemingray, 34 Ohio St. 381.

(23) French v. Stanton, 1 La. An. 8; Miller v. Franklin Bank, Supra; Comfort v. Patterson, 70 Tenn. 670; Spinney v. Hall, 49 Ind. App. 502, 97 N. E. 571.

(24) Third Swedish M. E. Church v. Wetherell, 43 Ill. App. 414.

(25) State Bank v. Receivers of Bank of Brunswick, 3 N. J. Eq. 266.

of it where the character of the claim is different, the right of set-off depending not only upon the capacity in which the claims arise, but also showing that the claims must be of the same character is the holding that the defendant in an action for conversion brought by a receiver may not set off his right to recover damages which is unliquidated on the ground that he was induced to sell goods to the corporation shortly before the appointment of the receiver upon the representation of its officers that it was solvent.[26]

A slight modification it may be said exists in the case of endorsers or sureties, the rule being that the claim against them must be liquidated and their right of set-off recognized.[27] In reality, however, this is not a modification of the rule since the obligation of the endorsers and sureties follows instanter upon maturity, the maturity of the obligation of the principal and the same reasoning which authorizes a set-off in favor of the principle independent of the maturity of his obligation would allow the set-off in favor of the surety. It seems, however, that the obligation of the surety must be real, and although in some cases which we have heretofore referred to the question of the insolvency of the principal has not been inquired into, nevertheless, it has been squarely held that if the principal be solvent the one whose liability is contingent may not avail himself of the set-off.[28]

Where the Assignment is Made for the Purpose of Set-off.—The courts have uniformly condemned assignments for the purpose of using the assigned claim as a set-off, thus enabling one creditor to obtain a preference, and this rule is applied where the assignment is taken after the appointment of a receiver and with notice of the receivership.[29] If, however, the assignment precedes the receivership, although it is subsequent to a suspension on the part of the debtor bank, it may be used as a set-off, for then the original principle under which set-offs are allowed in cases of receiverships applies and the receiver has taken his estate subject to the right of set-off which was existent at the time he took possession.[30]

Application of the Doctrine.—When it has been determined that a set-off is authorized, it becomes important to ascertain the measure and character of the set-off. The amount must have been ascertained, or at least be ascertainable in the sense of having been liquidated.[31] Interest may not be allowed, unless the obligations warrant it and a bank deposit which does not draw interest may not be made interest-bearing in order to liquidate the interest upon a note which stipulates for interest.[32] Should the amount of the set-off equal the amount of the receiver's demand, the defendant will be entitled to a general verdict in his favor, should the amount of the receiver's demand exceed the amount of set-off, the receiver will then be entitled to a verdict and judgment for the difference; if, however, the amount of the set-off exceeds the amount of the receiver's demand, the defendant will be entitled to a verdict and judgment with the right to present a claim for the sum found due him in the receivership proceedings.[33]

Right to Set-off Dividends.—Although the right of set-off may not be recognized

(26) McQueen v. New, 86 Hun. 271; 33 N. Y. Supp. 395.

(27) Harrison v. Harrison, 118 Ind. 179, 20 N. E. 746, 4 L. R. A. 111; Newberry v. Trowbridge, 13 Mich. 263; Building, Etc., Co. v. Northern Bank, 151 App. Div. 942, 136 N. Y. S. 1132, Affd. 206 N. Y. 400, 99 N. E. 1044; Davis v. Industrial Mfg. Co., Supra; Kilby v. First Nat. Bank, 32 Misc. 370, 66 N. Y. Supp. 579.

(28) Borough Bank v. Mulqueen, 125 N. Y. S. 1034, 70 Misc. 137.

(29) Stone v. Dodge, 96 Mich. 514, 36 N. W. 75, 21 L. R. A. 280; Van Dyck v. McQuade, 85 N. Y. 616; In Re Beecher's Estate, 65 Hun. 620, 19 N. Y. Supp. 971; Davis v. Mfg. Co., Supra; In Re Assignment of Hamilton, Supra; Venango Nat. Bank v. Taylor, 56 Pa. St. 14; Moseby v. Williamson, 52 Tenn. 278.

(30) Johnston v. Humphrey, 91 Wis. 76, 64 N. W. 317.

(31) In Re Humboldt Safe Deposit, Etc., Co., 3 Pa. Co. Ct. R. 621.

(32) People v. Canal Street Bank, 6 Misc. 319, 26 N. Y. Supp. 794.

(33) Kuebler v. Haines, Supra.

on the ground that the claims are not mutual or otherwise, nevertheless there may be a right on the part of the debtor to the estate or on the part of the receiver when it is to the interest of the estate to off-set sums which may become due to the debtor by way of dividends upon a claim filed by him against the estate.[34]

Conclusion.—Generally speaking, it appears that the rights to set-off claims against demands made by a receiver are very nicely balanced upon principles of general equity and probably in no comparatively minor department of the law is the principle of exact justice so scrupulously applied. It would be interesting for the general reader not particularly concerned with the questions involved and merely for the purpose of observing the nicety with which equities are balanced to read the cases which have heretofore been referred to in the notes, and from which the rule becomes apparent that when a demand is made by a receiver, the person from whom the demand is made, if he has a right to set-off as a matter of equity will be permitted to use that set-off and will only be liable to the receiver, if at all, for the difference between the sum owed him and the sum owed by him to the receiver.

COLIN P. CAMPBELL.

Grand Rapids, Mich.

(34) Naglee v. Palmer, 7 Cal. 543; Lamb v. Pannell, 28 W. Va. 663.

CONTRACTS—COMITY.

KLEIN, et al., v. KELLER.

Supreme Court of Oklahoma. June 9, 1914. Rehearing Denied July 28, 1914.

141 N. W. 1117.

A contract for the purchase of intoxicating liquors for a quantity in excess of that authorized by law, between a citizen of this state and a citizen of some other state, cannot be enforced in the courts of our state, although the laws of the other state in question may authorize such contract.

HARRISON, C. This is an action by Klein Bros. aginst J. Keller for the balance of $3,819.79 due for liquors, wines, etc., sold to Keller on account. Klein Bros, was a wholesale liquor firm of the state of Ohio. Keller was a retail liquor dealer of Gainesville, Tex., and had been doing business with the firm of Klein Bros. on an open account, making payment at different times, but finally closed out his retail liquor business in Gainesville and subsequently moved to Oklahoma, owing Klein Bros. the aforesaid balance. Upon his refusal to pay same, or any portion of same, after he had moved to Oklahoma, Klein Bros. instituted suit for the amount due. At the trial of the cause judgment was rendered in favor of Keller upon the theory that contracts for the payment of intoxicating liquors could not be enforced in the state of Oklahoma, being against the policy of the prohibitory laws of the state.

It is agreed between the parties that the account is just and correct; that if was made while Keller was engaged in the retail liquor business in Gainesville, Cook county, Tex., and while Klein Bros. were engaged in the wholesale liquor business in the state of Ohio; and that such business was legal and duly authorized, and such contract valid both in the state of Texas and the state of Ohio. That the laws of neither state were violated by the transaction between the parties, but that the contract between them was valid and enforceable in either state, and upon such agreed statement of facts, and that the account in question was true and correct and wholly unpaid, the court sustained defendant's demurrer to the evidence and rendered judgment in favor of defendant upon the theory that such contract was not enforceable in the state of Oklahoma. This is the sole question presented here. The case is ably briefed by both parties, and both parties made oral arguments to this court. The question, then, is whether the contract in question comes under the general rule that contracts valid where made are valid everywhere, or whether it falls under some one of the exceptions to the general rule.

(1) In 9 Cyc. 672, the general rule is stated to be as follows:

"The validity of the contract, that is, the question whether the contract is a legal or an illegal one, is judged by the law on the subject in the state or country in which the contract is entered into; the general rule being that a contract good where made is good everywhere, and a contract invalid where made is invalid everywhere."

On page 674, Id., the exceptions to the general doctrine are stated as follows:

(1) "Where the contract in question is contrary to good morals; (2) where the state of the forum or its citizens would be injured through the enforcement by its courts of contracts of the kind in question; (3) where the contract violates the positive legislation of the state of the forum, that is, is contrary to its constitution or statutes; and (4) where the

contract violates the public policy of the state of the forum."

From a somewhat extensive examination of the authorities and text-books, including Wharton, Story, and Dicey on Conflict of Laws, as well as many decisions cited in their texts, we believe the above statement of the law by Cyc. is universally accepted as correct; the only conflict in the decisions being the views which the courts of different jurisdictions have taken in cases coming under some one of the exceptions to the general rule.

It is unnecessary in the case at bar to pass upon the question whether a contract between a party in one state and a party in another state is to be adjudged by the laws of the state of the purchaser or the state of the seller. That question is not involved in this case, for it is conceded that the contract in question was valid in either state, and the business in which the parties were engaged was authorized by the law of both states. Nor are the decisions cited of cases where persons living in a prohibition state have ordered intoxicating liquors from dealers in states which authorize the traffic applicable to the case at bar. In a number of prohibition states where the statutes expressly provide against the manufacture, barter, or sale of intoxicating liquors, the courts of such states have held that purchases made from parties living in states which authorize the sale and manufacture of intoxicating liquors were deemed to have been made in the state where the purchase was made, and, being valid in such state, were enforceable against the purchaser, although the laws of his state prohibited such contracts. But in every case which we have been able to find where such character of contract has been upheld and enforced by the prohibition state, it has been upon the theory that the contract was made in the state which authorized such contracts, in the state in which such contracts are upheld, and upon the further theory that it did not appear that the seller had knowledge that the goods purchased were purchased for the purpose of violating the law, or being sold in violation of law, or that the seller entered into the contract with the purchaser for the purpose of violating the laws of the purchaser's state. See Black on Intoxicating Liquors, §§ 269, 270, and authorities cited in notes; 23 Cyc. 335-340, and authorities cited.

(3) While, on the other hand, many of such contracts have been held invalid because it appeared that the seller had knowledge that the purchaser intended to sell same in violation of law, or that such seller entered into the contract with the purchaser for the purpose of violating the statutes of the purchaser's state. But our own court in several decisions has held that the doors of the courts of this state are closed against the enforcement of that character of contracts. That is, where a resident of Oklahoma has purchased intoxicating liquors from dealers in states which authorize the sale of such liquors, that such contracts cannot be enforced in this state. Blunk v. Waugh, 32 Okla. 616, 122 Pac. 717, 39 L. R. A. (N. S.) 1093; Haley v. State, 34 Okla. 300, 125 Pac. 736; Pabst Brewing Co. v. Smith, 39 Okla. 403, 135 Pac. 381—these decisions being based upon the theory that the making of such contracts is in violation of the statutes of our state and the enforcement of same against the policy of our state, and in contravention of the objects to be attained by the enactment of our prohibitory law.

(2) Possibly the real basis of this theory is the doctrine followed in Hill v. Spear, 50 N. H. 253, 9 Am. Rep. 205, wherein the Supreme Court of that state held:

"A man is presumed to know and understand not only the laws of the country wherein he dwells, but also those of the foreign country or state in which he transacts business."

Under this theory of the law, a state which has a statute against the manufacture and sale of intoxicating liquors is justified in closing the doors of its courts against the enforcement of such contracts, and can do so on the grounds of public policy, without doing violence either to the general doctrine that "a contract valid where made is valid everywhere," or without infringing upon the rule of comity between states, and without straining the law in order to bring the case within one of the exceptions to the general rule. Under this theory the enforcement of a contract of this character is properly denied, because its very object is to do something in violation of law; to conduct a business which the law prohibits, a business which not only violates the letter and policy of the law, but imposes upon the moral sense of the state which enacts such law. In reality, it is not the contract that does the harm, but it is the carrying on the business which is contemplated in such a contract. The contract may violate only the technical letter of the law and aid in thwarting its objects. But the business contemplated in such contract not only does both these, but imposes upon the citizenship of the state by compelling it to endure the conduct of a business which the state deems injurious to its morals, and we think it not improper to say that it is sheer nonsense to pretend that there is a wholesale liquor house in the United States that is doing business or making contracts with citizens of Oklahoma but what knows that Ok-

lahoma has a prohibitory law. Hence the enforcement of contracts for liquor to be shipped into this state in quantities above what the law authorized is just as properly denied as if both parties resided in a state that authorized such contracts, and they agreed to come to Oklahoma and engage in the sale of intoxicating liquors. It is just as properly denied as would be a contract between two parties residing in a state which authorized gaming to come to Oklahoma and open a gambling hall. In either case it is a contract which has for its object the doing of something in violation of law; the doing of something which not only violates the law of the state, but inflicts upon its moral sense a business which it deems injurious and seeks to guard against by law.

(4) But such is not true in the case at bar. Klein Bros. and Keller did not contemplate the violation of any law nor the engaging in a business which the law prohibited. The laws of Oklahoma were not in the least affected by either contract, nor by the business in which either of them was engaged, and it is immaterial whether their contract was made in the state of Ohio or the state of Texas. It was perfectly valid in either state, and both states authorized the business in which the parties were engaged. Their contract, as well as the business which doubtless in a measure entered into it, both being valid in the states wherein the parties resided, and the laws of Oklahoma being affected by neither, we cannot say wherein the policy of our state could be impaired by enforcing such contract, or any reason why the law of contracts, as well as the rule of comity, should not constrain us to render judgment on a debt the correctness and validity of which is admitted. In our opinion the case at bar should be governed by the general rule on contracts. There was no intention on the part of either party to do other than make a contract which was valid in either state, and to carry on a business which was authorized by the laws of both states. In Green v. Collins, 3 Cliff, 494, Fed. Cas. No. 5,755, the court said:

"Satisfactory proof was introduced by the plaintiffs that they were duly licensed to sell such liquors at their place of business, and, it being conceded that the contract was valid at the place where it was made, it is clear that the provision in question, even if unrepealed, could not have any effect in the circuit court to defeat the plaintiff's right of action in this case, as they are citizens of another state. Doubts may at one time have existed upon the subject; but it is now well settled that a state law cannot discharge or suspend the obligation of a contract made in another state, if it was legal where it was made, and was a contract with a citizen of another state, not even if it was to be performed in the state whose law is invoked to defeat the remedy. Baldwin v. Bank of Newbury, 1 Wall. 236 (17 L. Ed. 534); Demeritt v. Exchange Bank, 20 Law Rep. 606 (Fed. Cas. No. 3780); Hunt v. Danforth, 2 Curt. 604 (Fed. Cas. No. 6887); Suydam v. Broadnax, et al., 14 Pet. 74 (10 L. Ed. 357); Union Bank v. Jolly, 18 How. 503 (15 L. Ed. 472); Watson v. Tarpley, 18 How. 520 (15 L. Ed. 509); Hyde, et al., v. Stone, 20 How. 175 (15 L. Ed. 874).

"Contracts are to be construed and carried into effect according to the intention of the parties thereto, and they are presumed to contract with reference to the law of the place where they reside and transact business, unless a different intention is manifest from the terms which they employ. Judd v. Porter, 7 Greenl. (Me) 337. The law of the contract travels with it wherever the parties thereto are to be found, and into whatever forum resort is had for its enforcement. Motion for new trial overruled. Judgment on the verdict."

This is our view of the case at bar: We think the judgment should be reversed, and the case remanded, with instructions to overrule the demurrer and render judgment in favor of plaintiffs in error.

PER CURIAM. Adopted in whole.

NOTE.—*Contracts Valid Where Made and to be Performed Enforceable Anywhere.*—The instant case reaches a correct conclusion, but its reasoning thereto is somewhat strange. It discusses the question whether or not the enforcement of a contract for the sale of liquor in another state is contrary to the policy of the forum, which condemns such contracts because in violation of its purely local policy as against prohibition. But the reason of such policy is only to refuse the aid of courts to those violating a police regulation and not because there is anything inherently contrary to morals in the contract. For example, if a debt is sued on the consideration of which is a gambling debt, that is a consideration neither the home forum nor any other would enforce, because the consideration is against good morals. And if the home forum permitted enforcement, that would not take away the immorality, according to the view of another forum where the contract would be denied enforcement.

This, however, is very different in a case where a contract is wholly legal and its enforcement is not contrary to any rule of morals, if it is sought to be enforced in a jurisdiction that merely forbids recovery for the consideration of the contract, where a sale upon such consideration is forbidden. For example, it is forbidden to buy intoxicating liquor to be used in a prohibition state. So far as its use is to be elsewhere and there to be delivered, the delivery elsewhere and for use there does not interfere with

the purpose of any prohibition law and is not denounced thereby.

Intoxicating liquor is an article of commerce and its sale constitutes consideration for a promise to pay, unless some law as to the place of its use or intended use may interfere therewith.

The excerpt made in the case from Green v. Collins, 3 Cliff. 494, and the cases that are cited are sufficient authority on this subject, to say nothing whatever of the validity of the contract as the sale of an article in interstate commerce and the duty of the courts to enforce whatever comes under its protection. But at all events there was no purpose to violate any law and any policy that might be violated had the law related to a sale of liquor to be used in Oklahoma, was a policy not characterizing the contract itself as *contra bonos mores*, but enforcement was denied as a means of sustaining a local policy. It was in no general sense a contract against good morals, as to which there might be conflict of law. But why with this being so a citizen of Oklahoma cannot make a contract for the purchase of liquor to be used elsewhere which is not valid and enforceable in that State, I cannot see. C.

ITEMS OF PROFESSIONAL INTEREST.

CRIMINAL TRIALS AND APPEALS IN ENGLAND.

In its comparatively brief period of existence the English Court of Criminal Appeal has gained general confidence and approval. So great, indeed, has been its success that the creation of a similar tribunal for Scotland is being agitated. The institution of an English appellate court had been advocated for several years, but its opponents were materially aided in staving off the reform by the "horrible example" of American criminal appeals. It was contended that Englishmen would be treated to a similar spectacle of reversals on technical grounds and the defeat of justice by interminable litigation. The conviction and imprisonment of Adolph Beck through mistaken identity deeply stirred the popular mind and overbore the influence of prophets of disaster. The court immediately upon its establishment began to refute the misgivings of conservatives not by theorizing, but by practical demonstration. It is probable that merely casuistical points have not often been tendered or discussed by the bar; certainly "technicalities" and "flaws" have received little attention from the bench. The appellate decisions have uniformly turned upon the merits of causes and displayed keen common sense and the desire to do justice. We have several times cited instances of the painstaking care of the English Court of Criminal Appeal in revising sentences so as to make punishment equitably fit the crime.

An illustration of the tribunal's quick eye for the actual merits is furnished by the following extract from the Law Journal (London) for July 25, 1914:

One of the most useful functions of the Court of Criminal Appeals is the insistence which it rightly makes on proper and adequate summings up on the part of trial judges. This is illustrated by the recent successful appeal of Rex v. MacGill (July 15). Here the appellant was indicted with another man at Salford Hundred Quarter Sessions for being concerned in the theft of money from the till of a public house bar. The appellant, his co-prisoner, whose name was Anthony, and an old man who died before the trial, were alleged to have been together in the bar on the occasion of the theft. The barman had to leave the bar for a moment, and on his return the money was gone. The only evidence against the prisoner was that the barman recognized him as one of the men who had been in the bar—a fact which was disputed by the defense. Even if he had been in the bar at the time, it is obvious that he might have been innocent. In such a case it was clearly the duty of the trial judge to draw attention to two points in his summing up, namely, the question whether or not appellant was in fact present in the bar at the time of the offense and the question as to whether, if there, he was acting in concert with the actual thief. Nothing of this kind was pointed out in summing up. The chairman merely told the jury that they must be reasonably satisfied as to which man stole the money, if any of them stole it. The court held that, whenever there are difficulties of fact or law, and particularly when there are several defendants against each of whom the case is rather different, the trial judge ought to make an adequate summing up, directing the jury as to the points affecting each prisoner. The conviction of MacGill was therefore quashed.

Although a case of mistaken identity immediately led to the creation of the English court, an innocent man may scarcely hope for relief on appeal if the issue of fact arising in such a proceeding has been found against him on a conflict of intelligent witnesses. (See State v. Gulliver, Iowa, 142 N. W. 948.) All the more, therefore, is it incumbent upon the trial court in such a case, as the appellate court points out, to give the defendant the advantage of every legal right and safeguard.

Beyond this specific question the decision in Rex v. MacGill is significant of the general spirit of intelligence and fairness not only

characterizing appellate courts, but exacted from trial courts. There is no doubt that English judges comment upon the evidence more extensively than the judges of most American state courts, perhaps even more extensively than the judges of the federal courts. From this custom an erroneous assumption has been drawn by many Americans that English judges actually steer juries to their verdicts. What is actually done is succinctly to present the real issues and classify and marshal the evidence. This practice is obviously of more assistance to the jury, more conducive to their arriving at truth and jutice, than the delivery of a perfunctory charge on generalities of law and abstractions of fact. It was typical of the policy of the English Court of Criminal Appeal to reverse a conviction because the trial judge had not made "an adequate summing up directing the jury as to the points affecting each prisoner."—*New York Law Journal.*

CORRESPONDENCE.

AVIATION AND TRESPASS.

Editor Central Law Journal:

I notice the short discussion of the rights of aviators in your article upon "Aviation and Trespass" in 79 C. L. J. 184.

Of course aviators, and those responsible for what they do, must respond in damages, nominally at least, for trespassing upon the lands or buildings of owners or tenants. When we go further, however, in my judgment, outside of mere dictum by Lord Coke and others, there is no real authority whatever for saying that an aviator may not freely navigate the air, precisely as those controlling ships may navigate the ocean.

Our highest court has sustained legislation of Massachusetts limiting the height of buildings in Boston, and thus it has been determined that there is really nothing to the claim that I own indefinitely into space and may build there, or prevent others from using the air. This being so, if legislatures can control the use of the air to the extent of preventing the owners of the land from building more than a reasonable height into the air, it must also be the case that nations can regulate the use of the air by aviators, in the same way that they may regulate the use of the water by navigators. So far as I know, decisions upon this subject have hardly come into being as yet, but ultimately the law should become settled along the lines indicated.

Respectfully yours,

Buffalo, N. Y. "LEX."

NOTE.—This journal treated this subject in 71 Cent. L. J. 1, under the title, "Aviation and Wireless Telegraphy as Respects the Maxims and Principles of the Common Law" and reached the conclusion that: "All of truth there seems to be in the maxim of ownership to the sky is, that within lines extended through all points of soil ownership to the sky is a space of preferential use to the owner of the soil and such use is interfered with only when enjoyment of the soil is diminished."

We might add that, if there is any occupation of the superincumbent air plane or preparation therefor, which would threaten such enjoyment, equity might interfere, the rules governing nuisances and their abatement being applicable.

But it will have to be conceded that air and light are of common benefit. Possibly there will be some decision on the law of privacy as preventing one from hovering above the premises of another, and of light as forbidding one to obscure the sky. Nous verrons decision on this subject relative to private right.—Ed. C.

HUMOR OF THE LAW.

A miller had a neighbor arrested for stealing wheat. Upon trial he could not prove it. The justice ordered the miller to apologize. "Well," said the miller to the man arrested, "I have had you arrested for stealing my wheat. I can't prove it, and I am sorry for it."

The governor was puzzled. "'Look here," he said, turning to his private secretary. "Can you tell me whether this note comes from my tailor or my legal adviser? They're both named Brown."

The note was as follows:

"I have begun your suit. Ready to be tried on Thursday. Come in. Brown."

Senator Ollie James told of a young man in Louisville who not long since hung up his shingle as attorney at law. One afternoon a friend, upon entering the office, observed upon the desk of the new legal light a dollar alarm clock.

"That's a good idea," said the friend. "One is very apt to oversleep these fine spring mornings."

The youthful attorney smiled sadly. "This alarm clock was not bought for the reason you mention," said he. "I merely keep it here to wake me when it is time to go home."

WEEKLY DIGEST.

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1. **Bankruptcy**—Chattel Mortgage.—A chattel mortgage withheld from record to bolster the credit of the mortgagor and to defraud his creditors, being void, did not constitute a preferred secured claim in favor of the mortgagee after the bankruptcy of the mortgagor.—Fourth Nat. Bank of Macon, Ga., v. Willingham, U. S. C. C. A., 213 Fed. 219.

2.——Disallowance of Claim.—That a person adjudged a bankrupt in 1910 made a composition agreement with his creditors in 1899, and made a secret agreement with A, one of them to pay his claim in full in consideration of a loan of the money required to pay the other creditors the composition percentage, held not ground for disallowance of A's claim against the bankrupt's estate, where the creditors never rescinded the composition, and the debtor, after execution of the composition, had voluntarily paid A the money loaned.—Crowder v. Allen-West Commission Co., U. S. C. C. A., 213 Fed. 177.

3.——Estoppel.—Where a debtor made an assignment for the benefit of creditors, creditors who became voluntary parties to the assignment contract were absolutely disqualified from filing an involuntary petition in bankruptcy based upon the assignment as an act of bankruptcy.—Despres v. Galbraith, U. S. C. C. A., 213 Fed. 190.

4.——Merger.—A demand proved in bankruptcy is not merged in the judgment of allowance, but the creditor may sue thereon in the state court, where the bankrupt was refused a discharge and no dividend was paid on the demand.—Valente v. Cosentino, Mass., 105 N. E. 551.

5. **Bills and Notes**—Forgery.—The forgery of one of the signatures on a note in the hands of a bona fide holder does not invalidate the note as to the genuine signatures.—Van Slyke v. Rooks, Mich., 147 N. W. 579.

6.——Installments.—A purchaser or indorsee of a note payable in installments after one installment is due and unpaid is chargeable with notice of the dishonor of the entire note and of the maker's equities, which infirmity affects every installment alike.—Hall v. E. W. Wells & Son, Cal., 141 Pac. 53.

7. **Carriers of Goods**—Burden of Proof.—Act Feb. 27, 1905, imposing on the carrier the burden of specifically alleging facts to show validity of contract limiting liability, is not in conflict with Const. U. S., art 1, § 10, or Amend. 14.—Cleveland, C., C. & St. L. Ry. Co. v. Blind, Ind. 105 N. E. 483.

8. **Carriers of Passengers**—Alighting.—Where passengers habitually alight at a point where they are not invited to do so, without any effectual means to prevent them from so doing, the carrier should see that they have a safe opportunity to so alight.—Florida East Coast Ry. Co. v. Carter, Fla., 65 So. 254.

9.——Contributory Negligence.—The attempt of a passenger on a street car to alight while slowly moving is not contributory negligence as a matter of law, where the conductor advised that course.—Gaines v. Ogden Rapid Transit Co., Utah, 141 Pac., 110.

10. **Champerty and Maintenance**—Defined.—At common law, champerty is a bargain with a plaintiff or defendant to divide the land or other thing sued for between them if they prevail at law; the champertor agreeing to carry on the suit at his own expense.—Lehman v. Detroit, G. H. & M. R. Co., Mich., 147 N. W. 628.

11.——Mortgage.—Where, at the time of a conveyance to defendant from a grantor who had just recovered his sanity, H was in possession under a contract of purchase executed by the grantee of W, the latter being the grantee under a void deed from the committee of the lunatic, the conveyance to defendant, though champertous as to H, was not so as to plaintiff, who claimed as mortgagee under W's grantee.—Newton v. Kruse, 147 N. Y. Supp. 1061.

12. **Chattel Mortgages**—Fraud.—Provisions in a mortgage upon a stock of goods authorizing the mortgagor to sell the property in the usual course of business and to apply the proceeds of such sales, after the payment of the expenses to the payment of the debt or to the replenishing of the stock, do not render the mortgage invalid as to the creditors of the mortgagor.—Vermillion v. National Bank of Greencastle, Ind., 105 N. E. 530.

13.——Seal.—Under the common law, unchanged by statute in South Carolina, chattel mortgage held not to require a seal.—Bank of Dillon v. Murchison, U. S. C. C. A., 213 Fed. 147.

14. **Contracts**—Building Contracts.—Where defendant, after default of a contractor, undertook to complete the work, there was no presumption that the contract price was sufficient to meet the cost.—Tri-Borough Contracting Co. v. R. V. Wechsler Realty Co., 147 N. Y. Supp. 971.

15.——Illegality.—The rule that where a plaintiff cannot make out his debt without showing an illegal act on his part, he must fail did not apply where the evidence in an action for milk sold and delivered would not overthrow the presumption of innocence, or warrant a finding that plaintiff had subjected himself

to a criminal prosecution for the sale of milk below standard.—Whitcomb v. Boston Dairy Co., Mass., 105 N. E. 554.

16.——Pleading.—The fact that the illegality of a contract sued on was neither pleaded as a defense nor urged at the trial, held immaterial, for where a contract is opposed to good morals, sound public policy, or statutory provisions enacted for the public good, the court, regardless of the pleadings, will of its own motion deny relief thereunder.—Barry v. Mulhall, 147 N. Y. Supp. 996.

17.——Reasonable Time.—A contract for doing work not specifying the time in which it is to be done, its completion must be in a reasonable time, and what is a reasonable time usually depends on the nature of the contract and the particular circumstances.—Reinforced Concrete Co. v. Boyes, Mich., 147 N. W. 577.

18. **Corporations**—Executors. — Where stock was bequeathed to executors in trust, corporation held entitled to treat the executors as the owners until their title was divested by a transfer on its books and not liable for the value of the stock where it recognized a transfer by the executors as such and not as trustees and issued new stock to the transferee.—Pearse v. National Lead Co., 147 N. Y. Supp. 989.

19.——Mutual Promises.—Mutual promises to sell and purchase stock are a sufficient consideration to support the agreement.—Flannery v. Wessels, Pa., 90 Atl. 715.

20.——Withdrawal of Offer.—That there was no consideration for an option to purchase stock did not render it unenforceable where it was accepted as an offer to purchase the stock before the seller attempted to withdraw it.—Brinley v. Neviss, 147 N. Y. Supp. 985.

21. **Courts** — Non-Residence. — Despite the ordinary rule that no judgment in personam can be recovered against a non-resident, except upon appearance, unless personally served within the jurisdiction, a valid judgment may be obtained where the property of a non-resident is attached, in which case the court may, for the purpose of adjudicating the right to the property, consider claims against the non-resident. —Johnson v. Whilden, N. C., 81 S. E. 1057.

22. **Criminal Law**—Confessions.—Statements by accused to an officer are not incompetent merely because he was at the time in custody, provided they were made without threats or inducements.—State v. Lance, N. C., 81 S. E. 1092.

23.——Preliminary Examination.—The right to a preliminary examination is entirely statutory; the proceeding being unknown at common law.—State v. Solomon, Wis., 147 N. W. 640.

24. **Damages** — Excessive.—Damages for a personal injury will not be considered excessive, unless at first blush they appear to be outrageous, or it is apparent that some improper element was considered in determining the amount.—City of Indianapolis v. Stokes, Ind., 105 N. E. 477.

25.——Injuries to Wife.—In an action by a husband for injuries to his wife, which prevented her from performing her accustomed household duties and chores around the farm, proof of the pecuniary value of her services is not necessary to support a finding for the husband; for the jury may, in their discretion, guided by their knowledge, award such sum as will justly compensate the husband.—Gregory v. Oakland Motor Car Co., Mich., 147 N. W. 614.

26.——Physical Examination.—In an action for personal injuries, the circuit court has no power to order plaintiff to submit to a physical examination by physicians appointed by the court.—Yazoo & M. V. R. Co. v. Robinson, Miss., 65 So. 241.

27. **Descent and Distribution**—Domicile.—It is a rule of international law that the succession to personal property depends upon the law of the domicile of the decedent.—Sultan of Turkey v. Tiryakian, 147 N. Y. Supp. 978.

28. **Easements**—Adverse Possession.—Where deeds created an easement in a strip between two buildings and in a stairway thereon for occupants of the upper stories of the building, neither owner could obtain title to the strip by adverse possession.—Gates v. Seybold, Mich., 147 N. W. 481.

29. **Eminent Domain**—Easement.—An owner of land condemned for a railroad right-of-way, but not presently required for the purposes of the road, may continue to use it in a manner not inconsistent with the full enjoyment of the easement.—Coti v. Owenby-Wofford Co., N. C., 81 S. E. 1067.

30.——Limitations on Exercise.—The right of eminent domain is an attribute of sovereignty, and the constitutional and statutory provisions are merely limitations upon the exercise of that right.—Arthur v. Board of Com'rs of Choctaw County, Okla., 141 Pac. 1.

31.——Purpose of Exercise.—A chartered commercial railroad company cannot condemn property for the construction of a spur track from its main line to serve an individual enterprise only.—Atlanta, S. M. & L. R. Co. v. Bradley, Ga., 81 S. E. 1104.

32. **Equity**—Estoppel.—Where defendant consented to numerous extensions of time, he cannot set up complainant's want of diligence in prosecution of the suit.—Vliet v. Cowenhoven, N. J., 90 Atl. 681.

33.——Laches.—The equitable doctrine of laches does not necessarily follow the statute of limitations, and a complainant may be denied relief in equity although less than the statutory period of limitations has run against his claim.—Pooler v. Hyne, U. S. C. C. A., 213 Fed. 154.

34.——Multifariousness.—To prevent a bill being multifarious, each party being interested in some material matters set out in it, and they being connected with others, it is not necessary that all parties be interested in all matters involved.—Michigan Nat. Bank v. Hill, Mich., 147 N. W. 486.

35. **Evidence**—Expert Testimony.—Where a subject is within the common knowledge and experience of ordinary men generally, it is not a subject for expert testimony, but if it does not come within the range of such common knowledge and experience, an expert may give his opinion.—Archer v. Ostemeier, Ind., 105 N. E. 522.

36.——Mailing Letter.—When a letter is shown to have been mailed, this establishes a prima facie presumption that it was received by the addressee in the usual course of the mails.—Standard Trust Co. of New York v. Commercial Nat. Bank, N. C., 81 S. E. 1074.

37.——Parol Testimony.—Where a note was given to the payee under an agreement that it should not become effective until the happening of a certain contingency, but should merely be a memorandum of a debt due from the maker, parol evidence, in an action upon the note, is admissible to show want of consideration.—Fidelity Title Guaranty Co. v. Ruby, Ariz., 141 Pac. 117.

38. **Execution**—Trust.—Land held in trust for the defendant is not subject to sale under execution.—Johnson v. Whilden, N. C., 81 S. E. 1057.

39. **Executors and Administrators**—Disposal of Assets.—One of two or more executors has power to dispose of the assets of the testator, even though his co-executors do not join in the transfer, and hence a transfer of stock by one executor was not invalidated by the forged signature of his co-executor thereto.—Pearse v. National Lead Co., 147 N. Y. Supp. 989.

40. **Exemptions**—Conditional Sale.—One has such title to property conditionally sold to him that he may claim it as exempt from forced sale for a debt other than the purchase price. —Stein v. Staats, W. Va., 81 S. E. 1132.

41. **Fixtures**—Annexation.—Chattels to become realty as between a mortgagee thereof and a subsequent mortgagee of the chattels must be actually annexed to the real estate with the intent of making a permanent accession to the freehold and must be applied to the use or purpose to which that part of the realty with which they are connected is appropriated. —Chancellor of State of New Jersey v. Cruse, N. J., 90 Atl. 673.

42. **Fraud**—Misrepresentations. — One who was induced to exchange her property for a farm, the value of which was fraudulently misrepresented, may maintain an action for damages arising from the fraud without rescinding the contract or offering to return the property. —Merlau v. Kalamazoo Circuit Judge, Mich., 147 N. W. 503.

43. **Frauds, Statute of**—Defense.—The statute of frauds does not make a parol contract within the statute absolutely void between the parties, but leaves them without the right to enforce it, but, if they execute it, it is binding between them.—Gagnon v. Baden Lick Sulphur Springs Co., Ind., 105 N. E. 512.

44.——Part Performance.—Under a parol contract to sell land, payment of the price and possession by the purchaser by virtue of the contract, and performance of labor enhancing the value of the property will take the case out of the statute of frauds.—McGinn v. Willey, Cal., 141 Pac. 49.

45. **Fraudulent Conveyances** — Antenuptial Contract.—A transfer of real or personal property from husband to wife after marriage, pursuant to an oral antenuptial contract, is a voluntary transfer without consideration, and void as to existing or intervening creditors.— Gagnon v. Baden Lick Sulphur Springs Co., Ind., 105 N. E. 512.

46. **Good Will**—Defined.—The good will of a trade or business is the advantage acquired by an establishment beyond the mere value of the capital stock or property in consequence of the general public patronage, etc., but does not include a covenant by the vendor not to re-engage in the same business in the same locality in competition with his vendee.—Faust v. Rohr, N. C., 81 S. E. 1096.

47. **Guaranty**—Construction.—A commercial credit guaranty, containing no express limitation as to time, amount or place, but executed to enable a person to procure goods for a particular purpose at a certain location, held not to extend to the credit of such person after she had ceased to do business at that place and while conducting business of the same kind in another state.—Bradshaw v. Barber, Minn., 147 N. W. 650.

48. **Homicide**—Aggressor.—Where one provokes a difficulty and kills his adversary, he is at least guilty of manslaughter, though at the precise time of the homicide it was necessary to kill such adversary to save his own life.— State v. Ray, N. C., 81 S. E. 1087.

49. **Husband and Wife**—Common Law.—At common law the husband was entitled to the possession of his wife's realty during their joint lives, with remainder to the husband for life if he survived the wife and there was a child of the marriage, and a further remainder to the heirs of the wife in fee simple.—In re Riva, N. J., 90 Atl. 669.

50.——Covenants.—A married woman is not as a general rule liable on her covenants in a deed or mortgage made jointly by herself and husband, in the absence of a statute imposing such a liability.—Menard v. Campbell, Mich., 147 N. W. 556.

51.——Separate Estate.—A married woman living in the home of her husband may bind her separate estate by a contract providing for the payment of a domestic, but such contract, where made solely upon the credit of the married woman, is not binding on the husband.—Bolthouse v. De Spelder, Mich., 147 N. W. 589.

52. **Insurance**—Assignment.—An insured, after a fire loss, could assign his interest under the policy.—Warner v. Narragansett Mut. Fire Ins., Co., Me., 90 Atl. 706.

53.——Endowment Policy.—Where an endowment policy provided that after twenty years it might be surrendered and the full reserve, with interest and surplus, would be paid to the insured, his executors, administrators, or assigns, the children of the insured had no rights in the policy.—Eisenbach v. Mutual Life Ins. Co. of New York, 147 N. Y. Supp. 962.

54.——Reinstatement.—Under a policy, providing that in case of lapse it could be revived on payment of all arrears and proof of insured's insurability satisfactory to the company, held that the company could not refuse to revive the policy and defeat its liability merely because insured died as the result of an accident before the application and proofs of insurability reached its home office.—Prudential Ins. Co. of America v. Union Trust Co., Ind., 105 N. E. 505.

55.—Insurable Interest.—Where a manufacturer of lumber who had contracted to sell it, and had received a large part of the proceeds under an agreement that title should pass on payment, received two small payments after defendant wrote a fire policy which covered his interest, the receipt of such payments did not destroy his insurable interest and avoid the policy.—Fuhrman v. Sun Ins. Office of London, Mich., 147 N. W. 618.

56.——Waiver.—A letter from an insurance company denying all liability for a fire loss, was a waiver of a provision for an arbitration as to the amount of the loss as a condition precedent to a right of action.—Oakes v. Pine Tree State Mutual Fire Ins. Co., Me., 90 Atl. 707.

57.——Warranty.—The fact that the application for a fire policy falsely stated that the property was not incumbered, was no defense to an action on the policy, where the insured did not know that the application contained such question and answer.—Warner v. Narragansett Mut. Fire Ins. Co., Me., 90 Atl. 706.

58. **Judgment**—Motion for.—In an action against a railroad company and its engineer, a motion for judgment for the company, on the grounds that the negligence was committed by the engineer, and that there can be no judgment against the company after a verdict for the engineer, is not recognized by the practice in the state.—Childress v. Lake Erie & W. R. Co., Ind., 105 N. E. 467.

59. **Libel and Slander**—Special Damages.— Special damages need not be alleged in a complaint charging the use of words directly disparaging a person in his calling or employment. Beek v. Nelson, Minn., 147 N. W. 668.

60. **Life Estates**—Improvements.—A tenant for life, who places improvements on the land, is not entitled to compensation therefor; but the improvements pass with the land to the remaindermen, and Code 1906, § 1848, allowing compensation for improvements, is applicable only where the party making the improvements is liable to account for rents.—Deanes v. Whitfield, Miss., 65 So. 246.

61. **Limitations of Actions**—Stipulations.— Reasonable contract stipulations limiting the time in which suit may be brought thereon are valid, though the period is at variance with

the statutory limitations.—Stewart v. National Council of Knights and Ladies of Security, Minn., 147 N. W. 651.

62.——Trust.—As between trustee and cestui que trust, in the case of an express trust, the statute of limitations has no application, and no length of time is a bar.—Hatt v. Green, Mich., 147 N. W. 593.

63. **Malicious Prosecution**—Similar Offenses. —In an action for malicious prosecution, proof of other similar offenses is inadmissible to directly prove guilt of the offense charged.—Hickey v. Shellenbarger, Mich., 147 N. W. 574.

64. **Marriage**—Annulment.—Where a marriage induced by the fraud of the husband was not annulled, a subsequent marriage of the wife to a third person was absolutely void.—McCullen v. McCullen, 147 N. Y. Supp. 1069.

65.——Presumption.—The presumption of marriage arising from cohabitation and repute is rebuttable, and, where it is shown that the cohabitation began meretriciously, or at a time when one party could not marry, the burden is upon the person claiming the marriage to show it independent of the presumption.—Bey v. Bey, N. J., 90 Atl. 684.

66.—Presumption.—The presumption in favor of the validity of a marriage is one of the strongest known.—Bruns v. Cope, Ind., 105 N. E. 471.

67. **Master and Servant**—Damages.—Striking employe evicted from house furnished him as compensation for his services held not entitled to damages for mortification, humiliation, etc., where most of those who saw the eviction were strikers or sympathizers with the strikers and with plaintiff.—Lane v. Au Sable Electric Co., Mich., 147 N. W. 546.

68.——Fellow Servant.—There can be no recovery from an employer for the death of as employe caused by the negligence of a fellow selvant, unless the employer was negligent in employing or retaining him.—Young v. Fresno Flume & Irrigation Co., Cal., 141 Pac. 29.

69. **Negligence**—Casual Connection. — The violation of a statute or ordinance is negligence, but is only evidence of the right to recover, which also requires evidence of a casual connection between the negligence and the injury. —Ledbetter v. English, N. C., 81 S. E. 1066.

70.——Contributory Negligence.—Where a party by his own acts contributes to the injury, he is not entitled to recover, however gross may be the defendant's negligence.—Indianapolis Traction & Terminal Co. v. Hensley, Ind., 105 N. E. 474.

71.——Custom.—A custom, the failure to observe which will constitute negligence, must be certain, uniform, and invariable, and must also be notorious and known to all persons of intelligence having to do with the subject to which it relates.—Fogarty v. Michigan Cent. R. Co., Mich., 147 N. W. 507.

72.——Statutory Violation.—One riding in an automobile operated at a rate of speed in excess of that preseribed by statute is guilty of negligence per se.—Westover v. Grand Rapids Ry. Co., Mich., 147 N. W. 630.

73. **Officers**—Ministerial Duties.—Public officers are liable to private persons for injuries resulting from the negligent performance of their ministerial duties.—Tholkes v. Decock, Minn., 147 N. W. 648.

74. **Payment**—Certified Check.—Where the creditor had a check sent by the debtor certified, it was a payment pro tanto of the debt.—Adams v. Weissner, 147 N. Y. Supp. 946.

75. **Principal and Agent**—Personal Liability. —An agent is personally liable for fraudulent misrepresentations of authority, or for making a contract in which he assumes authority which he knows he does not possess.—Williams v. De Soto Oil Co., U. S. C. C. A., 213 Fed. 194.

76.——Scope of Authority.—The owner of a horse, whose servant, to whom it had been intrusted for shipment, shipped it under a special contract in his own name, was bound by a limitation of the carrier's liability therein, in the absence of fraud, unreasonableness, or want of opportunity to ship at a higher rate, with unlimited liability, regardless of whether the owner specifically authorized its execution.—Cleveland, C., C. & St. L. Ry. Co. v. Blind, Ind., 105 N. E. 483.

77. **Quieting Title**—Laches.—Defendants in suit to quiet title held barred by laches of the right to assert in equity their claim to land as against grantees of the life tenant who had been for many years in possession and had paid taxes for and improved the land, which had largely increased in value since the rights of the remainderman accrued.—Pooler v. Hyne, U. S. C. C. A., 213 Fed. 154.

78. **Reformation of Instruments**—Parol Evidence.—Parol evidence or mistake in a written contract is admissible for purpose of reformation.—Archer v. McClure, N. C., 81 S. E. 1081.

79. **Sales**—Consideration.—Where the real owner of goods, which had been stolen, agreed to pay plaintiffs, in whose possession they were, the purchase price, plaintiffs cannot recover, for the promise is without consideration. —Marcus v. Mayer, 147 N. Y. Supp. 973.

80.——Damages.—Where defendant repudiated a contract for the sale of cotton seed on a specified date, the court did not err in selecting that date as the one on which the jury was to determine the market value of the cotton seed to award to plaintiff as damages the difference between the contract price and the market value of the seed.—Williams v. De Soto Oil Co., U. S. C. C. A., 213 Fed. 194.

81.——Delivery.—Where a seller billed goods to be delivered f. o. b., at a named point in its own name, and refused to release them until payment of a draft with bill of lading attached, though the railroad declined to deliver until prepayment of freight, and the buyer refused to honor the draft before delivery, although offering to pay the freight, the buyer is not liable; the delivery to the railroad company not being a delivery to him.—Planters' Oil Co. v. Lightsey, S. C., 81 S. E. 1102.

82. **Subrogation**—Mortgage.—Where a mortgagee's bill for a foreclosure did not describe the land sought to be foreclosed, and neither did the sheriff's deed, the foreclosure was wholly inoperative and the mortgage was unimpaired; and hence the mortgagee, having gone into possession and discharged prior mortgages, is entitled to subrogation thereto, his rights being those of a mortgagee in possession.—Vliet v. Cowenhoven, N. J., 90 Atl. 681.

83. **Trusts**—Personalty.—The creator of a trust in personalty, whereby the trustee was to pay her the income and such part of the principal as it might think necessary for her support, and at her death distributed the remainder among her next of kin, could revoke it without the consent of her nearest relatives.—Whittemore v. Equitable Trust Co., 147 N. Y. Supp. 1058.

84. **Wills**—Attestation.—A will having testator's signature at the end and attested by four witnesses, two of whom were credible and disinterested, complied with the requirements of the act of April 26, 1855, though the other two witnesses were not disinterested.—In re Carson's Estate, Pa., 90 Atl. 719.

85.——Construction.—The court, in ascertaining the intention of testator, may consider the circumstances, situation, and surroundings of testator at the time of the execution of the will, and of the state and description of his property.—Steiglitz v. Migatz, Ind., 105 N. E. 465.

86.——Forfeiture.—In case of a legacy of personal property, a provision that if any devisee, legatee, etc., should contest the will, he should forfeit his interest, etc., is merely in terrorem, and not enforceable unless there be a gift over in case of a breach, and a general gift of the residue is not a gift over.—In re Arrowsmith, 147 N. Y. Supp. 1016.

87.——Power of Appointment.—Where testatrix bequeathed the remainder of her property to her husband for his sole use, with power to dispose of the same during his lifetime, he was only entitled to exercise such power in his lifetime, and could not exercise it by will. —Mooy v. Gallagher, R. I., 90 Atl. 663.

88.——Probate.—A gift made by testatrix to a child about three months before the execution of her will, while she was in possession of all her faculties, and agreed to by two of her other four children as fair, could be proved in proceedings by the child to probate the will contested on the ground of undue influence.—In re Tunison's Will, N. J., 90 Atl. 695.